Supreme Court, U.S.
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No. 00-716

In The
Supreme Court of the United States

SHIRLEY A. LANG, *et al.*,

Petitioners,

v.

KOHL'S FOOD STORES, INC. and THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals properly exercise its appellate review authority to affirm summary judgment in favor of Respondents on the ground that Petitioners had failed to present sufficient evidence to demonstrate that Respondents' articulated reasons for the wage differentials between bakery, deli and produce department employees were pretextual?

STATEMENT REQUIRED BY SUP. CT. R. 29.6

Kohl's Food Stores, Inc. is a wholly-owned subsidiary of The Great Atlantic & Pacific Tea Company, Inc. ("A&P"). A&P has no parent company, and no publicly held company owns ten percent or more of A&P's stock.

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INTRODUCTION

Respondents, Kohl's Food Stores, Inc. and The Great Atlantic & Pacific Tea Company, Inc., respectfully oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. The Petition should be denied because the question presented does not involve conflicting decisions of courts of appeals or an important question of federal law; nor was the decision of the court below premised on an erroneous legal standard.

Petitioners assert that this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S. Ct. 2097 (2000) created a new controlling precedent requiring a re-examination of the factual record. But, *Reeves* did not change the law in the Seventh Circuit. Therefore, the Petition simply seeks further appellate review of the lower courts' concurrent application of *Reeves'* principles to the undisputed facts in this case. Moreover, because Petitioners failed to raise their *Reeves* argument in the Seventh Circuit, it is inappropriate for them to raise it here.

COUNTERSTATEMENT OF THE CASE

A. Factual Background[1]

Kohl's Food Stores, Inc. ("Kohl's") owns and operates retail grocery stores in the state of Wisconsin. Kohl's is a wholly-owned subsidiary of The Great Atlantic & Pacific Tea Company, Inc. (App. 21-22; R. 194 ¶ 1).

1. The Differences Between Produce, Bakery and Deli Department Jobs

Each store has a produce department, bakery department, and deli department (R. 194 ¶ 10). Bakery employees' primary functions are baking and packaging pre-baked goods (App. 40-41; R. 194 ¶¶ 167-169). Deli employees' primary function is to serve customers, e.g., slice meats and cheeses and fill containers with salads based on customer requests (App. 35; R. 194 ¶¶ 106-107). Produce employees are responsible for maintaining the freshness of highly perishable fruits and vegetables (App. 26-28; R. 194 ¶¶ 40-44, 50-51).

As found by the jury, the diverse work performed by the managers and clerks in these departments requires substantially different skill, effort and responsibility, and is performed under dissimilar working conditions. For example:

- Produce department employees are required to lift, carry and stock thousands of pounds more product each week than their bakery and deli counterparts. They also unload their own deliveries; bakery and deli employees generally do not (App. 29-31, 36-38, 43-44; R. 194 ¶¶ 77-80, 95-96, 114-117, 137-144, 181-185, 186-190).

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[1] The facts are fully set forth in the district court's decision granting summary judgment on the Title VII class claim. Set forth below is a summary of the facts which relate to the issue raised in the Petition for a Writ of Certiorari.

- Produce employees have far greater financial responsibilities since the produce departments typically generate more than twice the revenue and twice the profit generated by either the bakery or deli departments in the same stores (App. 51; R. 194 ¶¶ 210-216).

- Unlike bakery and deli employees, produce employees cannot rely on fixed "sell-by" dates to determine when to discard product (and thereby impact the store's profit margin). They have to independently judge the freshness and saleability of each perishable fruit and vegetable on their shelves (App. 27-28, 38, 43; R. 194 ¶¶ 41-43, 120, 177).

2. Kohl's Wage Scheme

Wages are set by collective bargaining between Kohl's and the United Food and Commercial Workers Union ("UFCW") (R. 194 ¶ 18). Produce and bakery employees are represented by Local 1444, and deli employees are primarily represented by Local 73A (App. 45; R. 194 ¶ 12).

Bakery and deli clerks are a subset of employees classified as "department clerks" in the labor agreements. All department clerks, regardless of their sex, are paid according to the same wage scale. Produce clerks, on the other hand, are a subset of employees classified as "regular clerks." All regular clerks, regardless of their sex, are similarly paid according to the same wage scale (App. 47; R. 194 ¶¶ 14-15). In 1995 and 1998, both Locals 1444 and 73A negotiated higher wage rates for regular clerks than department clerks (App. 49). During the relevant time period, approximately 63% of the higher-paid regular clerks were women (R. 194 ¶ 219).

The UFCW Locals which represent all Plaintiffs agreed to the wage rates at issue. Local 1444, which represents both produce and bakery managers, never proposed equalizing their wages. Local 73A, which represents deli employees, only proposed equalization for deli managers after this litigation was filed in 1998. With respect to clerks, in 1995 and 1998, the UFCW Locals offered wage proposals that would

have equalized the wages of department and regular clerks (App. 49; R. 194 ¶ 201).

Kohl's did not agree to any equalization proposals (1) because the Union did not press them and (2) Kohl's believed produce employees shouldered greater financial responsibility, exercised substantially greater independent judgment, and exerted substantially more physical effort than bakery and deli employees (App. 76; R. 194 ¶ 206). Additionally, market pressure did not drive Kohl's to equalize the wages because several of Kohl's largest competitors historically maintained the same wage differential between bakery, deli and produce employees (App. 50; R. 194 ¶ 206-208).

B. Proceedings

1. The District Court Proceedings

Petitioners' Complaint contained across-the-board allegations that Respondents discriminated against them on the basis of their gender by denying them opportunities for placement, training, promotion and compensation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), and wage discrimination under the Equal Pay Act, 29 U.S.C. § 206, *et seq.* ("EPA").

Pursuant to Fed. R. Civ. P. 23(b)(2), the district court certified for class treatment only Petitioners' claim of discriminatory compensation under Title VII (R. 116). The district court also allowed the EPA claim to proceed as an opt-in representative action pursuant to 29 U.S.C. § 216(b) (R. 116).

Prior to trial, the district court granted summary judgment to Respondents on the class-wide Title VII compensation claim, holding that, regardless of whether the jobs in question were substantially equal, Petitioners had failed to present persuasive evidence that Respondents intentionally paid bakery and deli employees less than produce employees because of the gender composition of these departments

(App. 74-78). At the same time, the district court also granted summary judgment on the individual claims of the 15 named plaintiffs, leaving for trial only the EPA claim of wage discrimination (R. 255). In reaching these decisions, the district court expressly rejected evidence that Petitioners now ask this Court to consider:

> [T]he job preference statistics relied on by plaintiffs are of little persuasive value. Among other things, these statistics reveal that female hirees who expressed no job preference on their application were much more likely to be assigned to either a bakery or deli department and much less likely to end up in produce than their male counterparts. Nevertheless, plaintiffs gloss over several crucial points, not the least of which being that some of them, as department managers, 'are responsible for making many of the allegedly discriminatory employment decisions that constitute plaintiffs' gender steering claim.' *See* Op. and Order on Class Cert, Dkt. #116, at 24. As observed by defendants, the application statistics also show that the phenomenon characterized by plaintiffs as 'steering' is partially the result of self-selection; 279 of the 630-woman sample stated a preference for the bakery or deli departments, compared to just 24 of the 224 male applicants. Finally, these statistics do not account for other factors capable of influencing job assignments such as the positions and shifts that were available at the time applications were filed or any preferences expressed by applicants during the rest of the application process. *See People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537-38 (7th Cir. 1997) (statistical study that 'fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation and is therefore inadmissible in federal court.')

(R. 255 at 15-16).

On August 13, 1999, a unanimous jury returned a verdict in favor of Respondents, finding that Petitioners had failed to prove that the jobs of bakery and deli clerks and managers required substantially the same skill, effort and responsibility under similar working conditions as their produce department counterparts (R. 297).

In their post-trial pleadings, Petitioners sought, *inter alia*, reconsideration of the district court's dismissal of the Title VII compensation claims (R. 304). Petitioners argued that the district court had failed to consider their so-called "steering" evidence (*Id.* at 7-9). By order dated August 30, 1999, the district court denied the request for reconsideration (App. 16-18).

2. Seventh Circuit Proceedings

On June 22, 2000, an undivided panel of the Seventh Circuit affirmed both the jury's verdict on the EPA claim and the district court's summary judgment ruling on the Title VII claim. In an opinion by Judge Easterbrook, joined by Judges Bauer and Rovner, the court observed that the jury's verdict on the inequality of the jobs in question made Petitioners' Title VII claim untenable in the absence of proof of discriminatory hiring, *i.e.*, steering (App. 4). The court then rejected Petitioners' steering evidence as being insufficient to demonstrate intentional discrimination, holding: "Plaintiffs disavow a steering claim but contend that Kohl's history is informative on the wage-discrimination claim. The district judge did not see how, neither do we" (App. 4-5).

On July 6, 2000, Petitioners filed a petition for rehearing in the Seventh Circuit on the Title VII claim, arguing, as they did in the district court, that the panel had failed to credit their "key evidence" of alleged discriminatory steering in the 1990's. *See* Appellants' CA Pet. for Reh'g at 1.

On August 3, 2000, the Seventh Circuit denied the petition for rehearing.

REASONS FOR DENYING THE WRIT

I. PETITIONERS FAILED TO RAISE THE QUESTION PRESENTED FOR REVIEW IN THE COURT BELOW

Petitioners argue that this Court should grant their Petition because this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S. Ct. 2097 (2000), changed the legal standard for granting summary judgment in employment discrimination cases and the court of appeals below applied the wrong standard in affirming summary judgment for defendants on the Title VII pay discrimination claim. While Respondents do not agree with this characterization of the Seventh Circuit's decision, this is not a "compelling" reason for this Court's review on a writ of certiorari. Sup. Ct. R. 10. The Petition is not based on conflicting decisions of courts of appeals; nor does it raise an "important question of federal law." *Id.* Moreover, the Petition is premised on an argument that Petitioners never raised below and have therefore waived before this Court.

Petitioners criticize the Seventh Circuit for not considering *Reeves*, suggesting that the appellate court somehow overlooked *Reeves* because it was issued ten days before the court of appeals' decision. Yet, there was no need for the Seventh Circuit to cite *Reeves*. Petitioners did not cite *Reeves* in the Seventh Circuit proceedings and, in any event, *Reeves* did not change the law in the Seventh Circuit. *See Reeves*, 120 S. Ct. at 2104 (*citing Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994)).

Reeves was decided on June 12, 2000, ten days before the original decision issued by the court of appeals and twenty-four days before Petitioners filed their petition for rehearing. Indeed, Petitioners did not even mention *Reeves* in their petition for rehearing. Additionally, nearly two months passed between this Court's *Reeves* decision and the

Seventh Circuit's denial of rehearing. At no time during this window did Petitioners file a motion in the Seventh Circuit seeking supplemental briefing to make their *Reeves* argument or submit a citation of supplemental authority pursuant to Fed. R. App. P. 28(j) and Circuit Rule 28(e).

Petitioners offer no excuse for their silence below. They cannot claim that they were unaware of the *Reeves* decision, as it was widely publicized and Petitioners' counsel have extensive experience in both individual and class action employment litigation. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Box v. A&P Tea Co.*, 772 F.2d 1372 (7th Cir. 1985), *cert. denied,* 478 U.S. 1010 (1986); *Meiressone v. Marriott Corp.*, 124 F.R.D. 619, 625 (N.D. Ill. 1989) (describing Petitioners' law firm as "a leader in the employment discrimination field")); *Orlowski v. Dominick's Finer Foods, Inc.*, 172 F.R.D. 370 (N.D. Ill. 1997); *EEOC v. Mitsubishi Motor Mfg., of Am., Inc.*, 990 F. Supp. 1059 (C.D. Ill. 1998).

Having failed to raise the question presented for review in a timely fashion in the court of appeals, Petitioners are not entitled to review in this Court in the absence of extraordinary circumstances, none of which have been asserted or exist in this case. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Kosak v. U. S.*, 465 U.S. 848, 850 n.3 (1984); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983).[2]

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[2] The decision in *Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Company,* 520 U.S. 893 (1997), relied on by Petitioners, does not dictate a different result. There the petitioners in a diversity case raised the new state supreme court ruling in the court of appeals, thereby preserving the issue for review in this Court.

II. PETITIONERS ARE MERELY SEEKING REVIEW OF THE LOWER COURT'S FACTUAL EVALUATION OF THEIR PRETEXT EVIDENCE

This Court uniformly disfavors petitions which primarily present questions of fact. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). This is particularly true where the findings of the district court receive the concurrence of the court of appeals. In such situations, the Court has often held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

As demonstrated by the substantial factual discussion in the Petition, that is precisely what Petitioners seek in this case. They chant the mantra of "new legal precedent," but the true import of their argument is their dissatisfaction with the courts' rejection of their steering and pretext evidence as insufficient to create a triable issue of fact. Because Petitioners repeatedly put this evidence before the district court and the Seventh Circuit and called specific attention to it when they sought reconsideration/rehearing in both courts, there is no question the lower courts considered and rejected the evidence. As discussed in Section III below, the same factual evaluation of the evidence would be required under *Reeves* as was applied in the lower courts. Thus, Petitioners' reliance on *Reeves* does not get them around the fact that a re-review of the factual findings is all that is being sought here.

III. THE RECORD "TAKEN AS A WHOLE" DOES NOT SUPPORT A REASONABLE INFERENCE OF INTENTIONAL SEX-BASED PAY DISCRIMINATION

While *Reeves* involved a judgment as a matter of law under Fed. R. Civ. P. 50, this Court reiterated that the standard for summary judgment under Fed. R. Civ. P. 56 " 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.' " 120 S. Ct. at 2097 (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)). In the context of summary judgment under Rule 56, a court must review the record "taken as a whole," giving "credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached.' " *Id.* (citations omitted).

This Court emphasized that simply because a plaintiff offers some evidence challenging the pretextual nature of the defendant's asserted reason for its actions, judgment as a matter of law (and, by analogy, summary judgment) is not precluded. "[T]here will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* "Whether [summary judgment] is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that may be properly considered on a motion for [summary judgment]." *Id.*

A. Petitioners Are Barely Able To State A *Prima Facie* Case

Petitioners' *prima facie* case of sex-based pay discrimination was weak. In the absence of direct evidence of intentional discrimination, plaintiffs alleging pay discrimination under Title VII must establish a prima facie case by demonstrating that they were denied equal pay for "equal work" as

defined by the Equal Pay Act. *See American Nurses Ass'n. v. Illinois*, 783 F.2d 716, 722 (7th Cir. 1986) (discussing *County of Washington v. Gunther*, 452 U.S. 161 (1981)). In denying summary judgment on the Equal Pay Act claim, the district court repeatedly commented on how it was a close question whether the jobs in the bakery, deli and produce departments constituted "equal work."[3]

B. Petitioners' "Steering" Evidence Has No Probative Value

Against the backdrop of a weak *prima facie* case, the probative value of Petitioners' evidence of discriminatory intent and/or pretext was even weaker. Petitioners' "animus" evidence consisted primarily of decades-old hiring practices and sex-segregated wage classifications in collective bargaining agreements, many of which predated the passage of Title VII, which both the district court and the court of appeals fully considered and rejected as being probative of nothing in the 1990's. The Seventh Circuit aptly summarized the insignificance of this dust-covered evidence:

> Plaintiffs make much of evidence that until the late 1960's Kohl's not only discouraged women from applying for certain positions but also had sex-segregated wage classifications. *This practice is long gone, and no vestige of the discrimination survives*. Wage schedules were merged 31 years ago,

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[3] Ultimately, the jury concluded that these jobs did *not* involve equal work. This result was foreshadowed by the district court's observations of the distinctions between the jobs: "Differences in the content of these tasks [performed by bakery, deli and produce employees] raise questions whether they are substantially equal" (App. 67); "produce managers may use more skill [than bakery and deli managers] when minimizing shrink and placing orders" (App. 68); "whether the produce, deli and bakery positions require substantially the same effort is a closer question" (App. 69); "whether the manager jobs are substantially equal in responsibility represents yet another close question" (App. 69); produce department refrigerated working conditions "might represent the kind of sustained intensity that would justify a wage differential" (App. 73).

> and . . . women hired during the discriminatory period today receive the same wages as men hired at the same time.

(App. 4).

Petitioners' purported evidence of sex-based "steering" in the 1990's was even less probative. Even though they implicitly acknowledge that this evidence was insufficient to support either their individual or class-wide claims of steering, Petitioners nonetheless persist in insisting that this same evidence was enough to get them a trial on their class-wide wage discrimination claim. Petitioners' continued arguments in this regard demonstrate a fundamental misunderstanding of what actual "steering" evidence is.

Petitioners never identified a single female job applicant who, during the actionable period, sought and was denied a produce job or who was discouraged from applying for a produce job or from whom notice of available openings in produce jobs was withheld. To the contrary, each of the fifteen named plaintiffs uniformly testified that no one at Kohl's *ever* did or said anything which led them to believe that they could not be produce employees (R. 209 at 3). There is also no evidence of any written policy, position description or job application barring women from seeking produce positions, *e.g.*, "males only." *Compare Teamsters v. United States*, 431 U.S. 324, 356 (1977) ("whites only" sign on the hiring office door). Likewise, Petitioners offered no evidence to suggest that the hiring managers in the various stores were instructed by their corporate superiors to direct female applicants into bakery and deli positions.[4] Correspondingly, there was no evidence that any male employee was discouraged from applying to the bakery or deli departments or that

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[4] A particular irony of Petitioners' steering argument is that, given the decentralized hiring process, it would have been the female class members themselves (who were bakery and deli managers) who were responsible for hiring their own predominantly female workforces.

bakery and/or deli managers were discouraged from hiring men into their departments (R. 209 at 11).[5]

Lacking any evidence of actual steering, Petitioners, instead, relied on raw statistical data as a proxy, claiming that a rational fact finder could infer intentional discrimination from such data. This Court has cautioned that statistics "come in [an] infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (*quoting Teamsters*, 431 U.S. at 340). Petitioners' statistical evidence was fraught with deficiencies, rendering it virtually useless in supporting a "steering" argument. *See* R. 255 at 15-16.

Petitioners' assertions that the district court failed to consider their steering evidence is contrary to the record. (Pet. 7, n.3).[6] The district court contemporaneously considered Respondents' motions for summary judgment on Petitioners' class claims and on Petitioners' individual claims. Petitioners relied on the same steering evidence in opposing

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[5] Petitioners take great umbrage with the Seventh Circuit's observation that the jury's verdict on the Equal Pay Act theory effectively made their Title VII claim moot. The point the appellate court made was simple (and consistent with *Reeves)*. Without some sort of direct evidence of actual steering, Petitioners would need far more than their flimsy raw statistics to show that intentional gender discrimination was the motivation for paying different wages to unequal jobs.

[6] Somewhat inconsistently, Petitioners also assert that the district court *did* consider their evidence but applied the wrong legal standard. For example, they claim the trial court rejected their historical evidence because the statistics were not "shocking" (Pet. 7). To the contrary, the district court simply took exception to the label of "shockingly segregated" which Petitioners had sought to apply to their statistics, noting that 20% of the produce clerks were women (App. 75). Similarly, when the district court said that Petitioners' animus evidence did not "compel" a finding of wage discrimination, the court was merely characterizing the evidence as indirect, rather than direct, evidence for purposes of applying the indirect, burden-shifting method of proof paradigm established in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

both motions. Therefore, in granting summary judgment on the class wage claim, the district court did not have to repeat the detailed analysis of the steering evidence set forth in its decision on the individual claims (R. 255 at 15-16). Moreover, Petitioners conveniently ignore the fact that they moved for reconsideration of the dismissal of their Title VII claim relying principally on their so-called "steering" evidence (R. 304). In denying the request for reconsideration, the district court considered the rehashed evidence, but concluded: "Nothing in plaintiffs' present submission convinces me that it is necessary to revisit those claims" (App. 16-17).

In addition to the inherent deficiencies in Petitioners' statistics, the record contains numerous other undisputed evidence that undermined Petitioners' gender segregation/steering evidence, to wit: From 1995 to 1998:

- 20% of the produce clerks were women (App. 75; R. 194 ¶ 221).
- Jobs in the higher-paid regular clerk classification, which includes produce clerks, have been predominantly held by women (R. 194 ¶ 219).
- Of all employees in clerk positions, a roughly equal number of men and women have held a higher-paid regular clerk job (R. 194 ¶ 218).
- 52.6% of female applicants desired bakery or deli positions (R. 86 ¶ 5).
- Among all applicants who expressed preferences for particular jobs, a higher percentage of women (52.6%) than men (48%) received a job they requested (R. 86 ¶ 6).
- The average pay rates of women in clerk positions generally exceeded the average pay rates of men in clerk positions in more than half of the years since 1983 (App. 49; R. 194 ¶ 222).
- Since October 1992, the negotiated hourly wages of bakery and deli managers have increased at a

higher rate than the hourly wages of produce managers (App. 49-50; R. 194 ¶ 202).

- Department clerks have received greater percentage wage increases than regular clerks at the same pay levels (App. 49; R. 194 ¶ 203).

C. Petitioners' Pretext Evidence Did Not Establish That Kohl's Proffered Reason For The Wage Differential Was Unworthy of Credence

Petitioners admit that their only evidence of pretext consisted of their attempts to impeach the credibility of Kohl's labor negotiator, Dan Daley. They do not contend that the courts below failed to consider this evidence. They simply disagree with the courts' assessment that their impeachment efforts were insufficient to support a reasonable inference of pretext.

Here, again, Petitioners claim *Reeves* offers them salvation with its statement that, at the summary judgment stage, a court must disregard any evidence offered by the moving party that has been contradicted or impeached. However, in this case the lower courts did not violate this teaching of *Reeves*. Rather, they concluded that Petitioners had failed in their attempts to discredit Daley's testimony, thereby leaving it unimpeached and uncontradicted.

Petitioners have mischaracterized Daley's so-called "admissions" as being misrepresentations of material facts. A brief, but truer, review of the record demonstrates that Petitioners have not accurately described the evidence to this Court.[7]

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[7] Unfortunately, this is not the first time in this litigation that Petitioners have misrepresented the record evidence to avoid an adverse result. *See* District Court Order Granting Summary Judgment on Plaintiffs' Individual Claims ("[T]here are troubling contradictions between deposition testimony provided by plaintiffs and representations made on plaintiffs' behalf by their counsel") (R. 255 at 13-14).

Petitioners' mischaracterizations of Daley's deposition testimony are myriad:

- Daley did not testify that he developed Kohl's reasons for the pay differential after the wage rates were negotiated (Pet. at 6). He simply testified that he never explained them to anyone at Kohl's, although he discussed the relative contributions of the various departments with lead negotiator John Rogers (R. 215 at 233-35).

- While Daley acknowledged that Kohl's did not have any documents specifically stating the reasons for the pay differential, Kohl's, through Daley, produced numerous documents which contain evidence of the differences between departments in sales, gross profitability, product freshness, product weight and shipments (R. 212 ¶ 63).

- Daley did not testify that physical effort, financial contribution, and independent judgment did not account for the pay disparity. Rather, he could not state what *percentage* of the pay disparity was specifically attributable to each of these individual factors (R. 215 at 246).

Daley's error as to *when* in the 1990's the union proposed wage restructuring does nothing to discredit his testimony as to *why* Kohl's maintained the wage differential. Similarly, the fact that Daley lacked personal knowledge but had only been told by the unions that the wage gap arose in the 1960's when grocery stores first incorporated bakeries and delis inside the stores is irrelevant to the issue of why Kohl's paid bakery and deli employees different from produce employees in the 1990's.

These kinds of attack on a decisionmaker's credibility are insufficient to impeach his substantive testimony concerning the employer's rationale for its actions. When the record clearly demonstrates that differences in effort, responsibility, revenue and profitability exist between the jobs in question, and these are the articulated reasons for the wage differential, Petitioners had to do more than criticize

the documentation or lack of communication on the issue to show pretext. As the district court observed, Daley did not have to give the union a complete explanation of all the reasons for the wage disparity in 1995 "because he was neither asked to do so nor pressed for additional information after his initial response. . . . [A]bsent some other compelling motivation, such as a lawsuit, Daley had no reason to volunteer more detail. There is nothing inherently suspicious about his silence on the matter." (App. 78). *See also Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998) ("[s]imply because an explanation comes after the beginning of litigation does not make it inherently incredible"); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990) (fact that the employer did not document its reasons for not promoting the plaintiff until after the plaintiff sued failed to establish pretext); *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992) (refusing to give substantial weight to a position initially asserted in an administrative proceeding because "myriad factors undoubtedly influence the positions taken in such a forum").

CONCLUSION

Not every summary judgment case can or should be reviewed by this Court. Nor should such cases be remanded for further consideration in the court of appeals just because a new decision has issued in this Court which neither alters the legal standard, nor the outcome, in the courts below. Given the commonplace nature of the summary judgment proceedings here, if certiorari is granted or remand ordered in this case, there would be hundreds of summary judgment cases which this Court would similarly have to consider. Accordingly, and for all the foregoing reasons herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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